Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAREN O'CONNOR, by her parents and next friends, JOSEPH O'CONNOR and FRANCES O'CONNOR,

Petitioner,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT 23, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the doctrine of "separate but equal," a school may exclude a qualified female student, solely because she is female, from a male basketball team which affords a level of competitive ability suited to her skills, and may limit her to playing on a female team of lower competitive ability?

2. Whether the segregation of school athletic teams on the basis of sex, so as to exclude a qualified female from an opportunity to play on a more competitive male team, is substantially related to the government's interest in promoting female sports programs?

PARTIES TO THE PROCEEDING

Petitioner Karen O'Connor brings this petition by her parents and next friends, Joseph O'Connor and Frances O'Connor. Respondents are the Board of Education of School District No. 23, a body politic and corporate, various school officials,* and Robert D. White, an officer of the Mid-Suburban Junior High School Conference. The Conference was named as a party-defendant in the complaint, but was not a party to appeal before the Seventh Circuit.

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* These respondents are: Dean Eitel, Sallyann Okuno, Jane Adelman, Susan Lewis, James Kastner, Ann Marie Lundstrom and Mary Ann Stitak, as officers and members of the Board of Education of School District 23; Edward Grodsky, as Superintendent of School District 23; and Philip Arenstein, as Principal of MacArthur Junior High School.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari be issued by this Court to the United States Court of Appeals for the Seventh Circuit to review the judgment and opinion entered in this cause.

PROCEEDINGS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at 645 F.2d 578, and is set out as Appendix A hereto. The order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing *en banc* is unreported, and is set out as Appendix B hereto. The opinion of Justice Stevens, sitting as Circuit Justice, denying a petition to vacate the stay pending appeal of the district court's order, which stay was granted by the Court of Appeals, appears at ____ U.S. ____, 66 L.Ed 2d 179, and is set out as Appendix

C hereto. The unreported oral opinion of the district court granting petitioner's motion for the entry of a preliminary injunction is set out as Appendix D hereto.

JURISDICTIONAL STATEMENT

Petitioner appeals from the judgment of the United States Court of Appeals for the Seventh Circuit entered April 10, 1981. A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied 5-3 by the Seventh Circuit on July 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. CONST. amend. V

U.S. CONST. amend. XIV

20 U.S.C. § 1681

45 C.F.R. § 86.41

STATEMENT OF THE CASE

This case involves important and unsettled questions concerning the constitutionality of intentionally imposed gender based classifications on the athletic field. Although in recent years many federal and state courts have looked with disfavor on the restriction of athletic teams to a single sex, the constitutionality of segregated teams remains unresolved. Some courts and commentators have revived the "separate but equal" doctrine, discredited by this Court twenty-seven years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), in the area of sex segregation in athletics.

Petitioner Karen O'Connor, a junior high school student, is a gifted athlete, particularly in the sport of basketball. As a sixth grader, a professional basketball coach rated O'Connor's prowess on the basketball court equal to or better than a male eighth grader. During her competitive basketball career, O'Connor has participated as the only female on numerous organized teams and leagues. She has excelled on virtually every team on which she has played, and her abilities have brought her numerous honors and distinctions.

O'Connor attends MacArthur Junior High School, which has four interscholastic basketball teams — boys' and girls' teams for the eighth grade and the seventh grade. Eighth graders are eligible for only the eighth grade team of their sex. Sixth and seventh graders are permitted to try out for either the seventh or eighth grade team of their sex.

In late August, 1980, O'Connor, through her parents, sought permission from her school to try out for, and, if found qualified, to play on one of the school's boys' basketball teams. Both boys' teams provided a higher competitive level than their counterpart girls' teams. Oral and written requests were submitted to the school principal and the Board of Education. Each request was denied, without explanation.

Prior to the scheduled try-outs for the boys' basketball teams in October, 1980, O'Connor, by her parents, filed suit in federal district court to enjoin the respondents' enforcement of any rule which would prohibit her participation on a boys' team. O'Connor challenged only one of the two sex discrimination practices of the respondents. At no stage of these proceedings has O'Connor raised any issue as to respondents' practice of excluding males from participating on girls' teams.

This cause proceeded before the district court on O'Connor's motion for injunctive relief without any dispute as to the differences in competitive levels between the boys' and girls' teams. Indeed, both in their arguments before the trial

court and in their briefs on appeal, the parties explicitly recognized and agreed that the level of competitive ability on the boys' teams is higher than that on the girls' teams. This disparity was understood by both the trial court and the Court of Appeals.

It is particularly important to underscore the issues which are not involved in this controversy. Petitioner has not proceeded with her case on the theory that the boys' and girls' basketball teams are unequal on any basis other than the level of competition available on each. She has neither admitted nor denied that the boys' and girls' teams are equal in any other respect, such as funding, coaching or the scheduling of games and practices. This factual issue has not been placed in controversy. Similarly, no evidence was introduced nor arguments made by any party concerning health issues or the distinction between so called contact and non-contact sports. These, too, are non-issues with respect to the instant controversy.

O'Connor's fundamental claim before the district court was that the operation of respondents' gender based practices violated her constitutional right to equal protection of the law, as well as those rights statutorily guaranteed her under Title IX. Because the athletic opportunities being offered her by her school were inferior to those offered males, O'Connor sought redress of her right to be free from discrimination based on her sex. She asked not to be precluded from playing on a more competitive school basketball team solely because she was a girl.

Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1343. O'Connor sought redress of her rights, secured by the fifth and fourteenth amendments of the United States Constitution pursuant to 42 U.S.C. §1983, as well as her statutory rights under 20 U.S.C. §1681. She also sought declaratory relief pursuant to 28 U.S.C. §2201, that certain regulations of the federal Department of Education, specifically 45 C.F.R. §86.41, violated her rights to due process and equal

protection. Under pendent jurisdiction, petitioner presented certain state constitutional and statutory claims. The state claims are not the subject of this petition.

The district court heard oral argument on O'Connor's motion for preliminary injunctive relief and considered the affidavits and memoranda of law submitted by the parties. In an oral opinion (Appendix D), it found that respondents' discriminatory practices unconstitutionally infringed on petitioner's fourteenth amendment right to equal protection of the laws. The court entered a preliminary injunction enjoining respondents from denying petitioner the opportunity to try out for and, if qualified, to play on a boys' basketball team. The district court denied respondents' motion for a stay pending appeal.

Respondents filed their notice of appeal and a motion for stay pending appeal with the United States Court of Appeals for the Seventh Circuit. A three-judge panel, by a 2-1 vote, granted the motion for stay, which was affirmed by a vote of 5-3* on O'Connor's petition for an *en banc* reconsideration of the stay. Petitioner then applied under 28 U.S.C. §1651 to Justice John Paul Stevens, as Circuit Justice, to vacate the stay pending appeal. Justice Stevens, in a brief opinion, declined to overrule the Court of Appeals (Appendix C).

Although respondents' appeal proceeded before the Seventh Circuit on an expedited basis, with oral argument on December 11, 1980, a decision was not rendered until April 10, 1981, when the appeals court dissolved the preliminary injunction and remanded the case to the district court. O'Connor's petition for rehearing and suggestion for rehearing *en banc* before the Seventh Circuit was denied on July 2, 1981, by a vote of 5-3.

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* Judge Richard D. Cudahy, who as a member of the three-judge panel voted to impose the stay, reversed himself and was one of the three dissenters.

REASON FOR GRANTING THE WRIT

THE INCREASED CHALLENGES IN FEDERAL AND STATE COURTS TO THE LEGITIMACY OF SEX BASED CLASSIFICATIONS IN ATHLETICS HAVE RESULTED IN IMPORTANT AND UNSETTLED QUESTIONS OF FEDERAL LAW, BOTH CONSTITUTIONAL AND STATUTORY, WHICH NECESSITATE RESOLUTION BY THIS COURT.

1.

The Doctrine of Separate But Equal, Put to Rest in *Brown v. Board of Education*, Is in Danger of Revival.

In the landmark decision of *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court discarded its long-embraced acceptance of the "separate but equal" doctrine, recognizing that separate is inherently unequal. *Id.* at 495. Despite the lesson of the bitter and unpleasant aftermath of *Plessy v. Ferguson*, 163 U.S. 537 (1896), there is reason to believe that this pernicious doctrine will be reborn in the area of sex segregation. The existing acceptance of this principle brings into mind one judge's warning "that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*." *Vorcheimer v. School District of Philadelphia*, 532 F.2d 880, 888 (3rd Cir. 1976) (Gibbons, J., dissenting), *aff'd mem. by an equally divided court*, 430 U.S. 703 (1977). *See also J.S.K. Enterprises, Inc. v. City of Lacey*, 6 Wash. App. 43, 492 P.2d 600, 605 (1972); *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 289 N.E.2d 495, 503 (1972) (DeBruler, J., concurring); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 4 Pa. Cmwlth. 448, 287 A.2d 161, 168 (1972). Accordingly, the "separate but equal" doctrine must again be rejected firmly.

The status of the *Brown* decision stands as testimony to the importance of its rejection of the "separate but equal" principle. *Brown* mandated the replacement of a mechanical application of what appeared to be a symmetrical system with an in-depth analysis of the substance and effect of discriminatory practices. The Court recognized that alleged equality of tangible factors, such as facilities, funding and staff, did not create true equality. "Separate but equal" was recognized as nothing more than an illogical side-step from a true analysis of the purpose and effect of exclusionary state action.

The parallels between race segregation and sex segregation in the context of educational facilities compel the conclusion that the "separate but equal" doctrine should not be revived. The Seventh Circuit failed to analyze the import of its conclusion that separate but allegedly equal school athletic teams are constitutionally permissible.[1] Its decision must be reversed before other courts begin to embrace such an ill-conceived result.

Like race, sex is an immutable characteristic, bearing no relationship to the actual ability of individual females to compete in sports. *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (opinion of Brennan, J.); *Yellow Springs Board of Education v. Ohio High School Athletic Ass'n*, 647 F.2d 651, 667 (6th Cir. 1981) (Jones, J., concurring in part and dissenting in part). When qualified females are relegated to less competitive athletic teams solely because of their sex, a stigma of inferiority

[1] While the Seventh Circuit suggested that separate but equal teams had been endorsed elsewhere, it cited only *Bucha v. Illinois High School Association*, 351 F.Supp. 69 (N.D.Ill. 1972) in support of its conclusion. 645 F.2d at 581. No other court has embraced the separate but equal concept relative to sex segregation in athletics other than in dicta. Based on the fact that *Bucha* applied the rational relationship test, and that it was based on outdated stereotypes, it is extremely surprising and disturbing that the Seventh Circuit would cite that opinion with approval.

necessarily attaches. See *Brenden v. Independent School District 742*, 477 F.2d 1292, 1296-97 (8th Cir. 1973); Comment, *Plessy Revived: The Separate But Equal Doctrine and Sex Segregated Education*, 12 Harv. C.R.-C.L. L.Rev. 585 (1977) (hereinafter referred to as "Comment, *Plessy Revived*"); Jewett, *The Equal Rights Amendment & Athletics*, 1 Harv. Women's L.Rev. 53, 70 (1978) (hereinafter referred to as "Jewett"); Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 Syracuse L.Rev. 535, 556 (1974) (hereinafter referred to as "Comment, *Sex Discrimination*"). The attitude that women are second rate competitors will only be reinforced if all women are barred from competing with the so-called first rate athletes. *Jewett, supra.* The exceptional female athlete who would rather compete against men is relegated to a less competitive, sex segregated team. Comment, *Sex Discrimination, supra.* The effect of this characterization of women athletes is precisely the type of archaic, unjustified and damaging stereotype forbidden by the equal protection clause. *Craig vs. Boren*, 429 U.S. 190, 198-99 (1976); *Frontiero v. Richardson, supra* at 684-687.

Because the doctrine of "separate but equal" has been so thoroughly discredited, judicial comment on it in the last ten years was scarce until the Seventh Circuit's ruling below. However, numerous commentators have warned of the dangers inherent in the revival of this notion in the context of sex segregation, particularly with respect to athletics. *See* Comment, *Plessy Revived, supra;* Jewett, *supra;* Comment, *Sex Discrimination, supra;* Stroud, *Sex Discrimination in High School Athletics*, 6 Ind.L.Rev. 661, 677 (1973). Each has recognized the inherent inequality of sex segregated teams. Judge Jones, in his thoughtful concurring and dissenting opinion in *Yellow Springs*, was similarly concerned with the apparent renewed interest in the application of the separate but equal doctrine. Judge Jones recognized that allowing sex segregated teams is synonomous with sanctioning unequal teams. He concluded that:

> [T]he equal protection clause requires schools to give qualified female competitors the opportunity to play on the "male" interscholastic varsity team.
>
> . . . .
>
> . . . [R]estricting female athletes to a "separate but equal" basketball program . . . transgresses their constitutional right to an equal opportunity to participate in sports.

647 F.2d at 666-67.

"Separate but equal" was not so much a legal principle as a factual assertion intended to defeat an equal protection challenge to a statutory classification. It met its demise in *Brown* because of its total failure to reflect a realistic analysis of discriminatory practices. This Court must not permit this ill-disguised tool of bigotry to once again rear its ugly head.

2.

Heightened Scrutiny Requires Something More Than a Bare Assertion That a Sex Based Classification Substantially Furthers a Legitimate State Objective.

For the middle-tier test, applicable in cases of sex discrimination, to remain meaningful, this Court must ensure that it is applied consistently and fairly. Where, as here, a court validates a sexually discriminatory classification which bears no relation to the government's asserted objective, much less a substantial relation, its decision must be reversed. See *Michael M. v. Superior Court of Sonoma County*, ____ U.S. ____, 67 L.Ed. 2d 437, 454 (1981) (Brennan, J., dissenting); *Orr v. Orr*, 440 U.S. 268, 278-87 (1979). The middle-tier test requires more than a facile, mechanical application.

The Court has now firmly established that to withstand challenge under the fifth and fourteenth amendments, gender based discriminatory practices must serve important governmental interests, and must be substantially related to the

achievement of those objectives. *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr, supra*. The party which is seeking to justify its discriminatory practices bears the burden of proving both the importance of its asserted objective and the substantial relationship between its discriminatory classification and that objective. *Wengler v. Druggists Mutual Insurance Co., supra* at 151; *Caban v. Mohammed, supra* at 393; *Craig v. Boren, supra* at 204.

The existence of a valid governmental objective does not lessen the requirement that the classification must substantially serve the stated goal. *Wengler v. Druggists Mutual Insurance Co., supra* at 151-52; *Caban v. Mohammed, supra* at 391; *Orr v. Orr, supra* at 280-83. The bare assertion that a gender based classification substantially furthers a legitimate government interest, without further proof, does violence to the expectation that this test will be carefully applied. *Craig v. Boren, supra* at 200-204.

The decision below exemplifies an unjustified acceptance of a discriminatory policy which bears little, if any, relationship to the asserted governmental objective. Proponents of the separate but equal approach, including respondents, claim to be promoting the full participation of women in sports. Although this objective is clearly worthy, the exclusion of females from boys' basketball teams not only fails to promote women's athletics, but also relegates women's athletics to an inferior status.

The claim that this objective is achieved through sex segregated teams consists of two unsubstantiated arguments. The first is that allowing top female athletes to play on men's teams harms the women's program by draining it of its top talent. Such a contention "rests on sheer speculation. Plaintiffs could as easily contend that the participation of top female athletes with men will enhance the reputation and glamour of female athletics and encourage more women to participate.

. . ." *Yellow Springs Board of Education* v. *Ohio High School Athletic Ass'n., supra* at 664-65 (Jones, J., concurring in part and dissenting in part). *See also Brenden* v. *Independent School District 742,* 342 F.Supp. 1224, 1233 (D.Minn. 1972), *aff'd* 477 F.2d 1292 (8th Cir. 1973). Moreover, even if top female athletes are forbidden to play on boys' teams, they cannot be forced to play, nor is there any proof that they would play, on the girls' teams. Thus, there is no assurance that respondents' practices will encourage female athletics.

The second argument, and the one relied upon below by respondents, is that if females are allowed to play on all-male teams, then males must be allowed on girls' teams, resulting in male dominance of women's sports programs. There is neither a factual nor a legal basis for this argument.[2] No court had ever adopted such reasoning until the Seventh Circuit rendered its opinion. In *Gomes v. Rhode Island Interscholastic League,* 469 F.Supp 659 (D.R.I. 1979), *vacated and dismissed as moot,* 604 F.2d 733 (1st Cir. 1979), the district court stated just the opposite. It held that separate and exclusive teams for women are constitutionally permissible. *See also Petrie v. Illinois High School Ass'n,* 75 Ill.App.3d 980, 394 N.E.2d 855 (1979); *Yellow Springs Board of Education v. Ohio High School Athletic Ass'n., supra* at 665 (Jones, J., concurring in part and dissenting in part). *But see Attorney General v. Massachusetts Interscholastic Athletic Ass'n.,* 79 Mass.Adv.Sh. 1584, 393 N.E.2d 284 (Mass. 1979). The district court in *Gomes* reasoned that the constitution allowed for compensation of past discrimination,

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[2] As Justice Stevens noted, respondents' argument to this effect is inconsistent with the remaining aspects of their rules regarding participation on athletic teams. Sixth and seventh graders can play on an eighth grade team, but not vice versa. "The fact that an eighth grader must face competition from talented seventh graders without reciprocal rights indicates that there is no necessary reason why boys may not be required to compete with talented girls without reciprocal rights." *O'Connor v. Board of Education,* ____ U.S. ____, 66 L.E.2d 179, 184 n.4 (Stevens, Circuit Justice, 1980).

but that it forbade the use of the broad and archaic stereotypes which have previously been utilized to keep girls off boys' teams.[3] *See* Note, *Sex Discrimination and Intercollegiate Athletes: Putting Some Muscle on Title IX*, 88 Yale L.J. 1254, 1274 (1979); Cox, *Intercollegiate Athletics and Title IX*, 46 Geo. Wash. L. Rev. 34, 55, 59 (1977).

Respondents' segregation is not justified simply because it works for most females. While separate teams may provide opportunities for participation for many females, they fail to accommodate the superior woman athlete. Comment, *Sex Discrimination, supra.* This Court has recognized that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Los Angeles v. Manhart*, 435 U.S. 702, 708 (1978); *Caban v. Mohammed, supra* at 391-94; *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972). *But see O'Connor v. Board of Education, supra.*

While a gender based classification like respondents' may not require an inquiry into the availability of a "less restrictive alternative," *see Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), the constitutional guarantee of equal protection requires that the government's classification be "sufficiently precise" to meet its purpose. Note, *Sex Discrimination in High School Athletics*, 57 Minn. L.Rev. 339, 356 (1972). Where there exist a wide variety of alternatives to a gender based classification by which the government's objective can be achieved, the discriminatory policy can hardly be deemed precisely drawn, and cannot pass constitutional muster.

Commentators on sex discrimination in athletics have proposed numerous alternatives to the single sex approach endorsed by the Seventh Circuit. *See* Jewett, *supra;* Note, *Sex*

[3] Of course, the Court need never reach the question of whether it is constitutional to keep boys off girls' teams.

Discrimination in High School Athletics, supra; Stroud, *Sex Discrimination in High School Athletics, supra;* Note, *Sex Discrimination and Athletics: Putting Some Muscle on Title IX, supra.* A common theme running through these legal comments is that athletes should be grouped by ability rather than sex. The top athletes, regardless of sex, should be allowed to compete on the most competitive teams. As to the less competitive team, it may well be that the most accurate way to limit or define its membership is by sex, restricting it to females.

Petitioner has never sought to impose any one system or basis of classification on respondents, nor has she asked any court to so do. That type of decision is more properly left up to respondents. But if respondents' intentional segregation on the athletic field does not further their stated objective, and when this objective can be achieved by less drastic means, respondents' conduct must be deemed to exceed constitutional boundaries.

The faulty logic of the Seventh Circuit in finding a correlation between respondents' objective and their means of achieving that objective is a troubling precedent. The integrity of the "middle tier" analytical tool utilized in sex discrimination cases is threatened by such a short-sighted, hasty or ill-conceived application of it. Unless and until the middle-tier test is applied uniformly and even-handedly throughout the federal courts, this Court must intervene to ensure that gender based classifications are forbidden unless precisely drawn to accomplish a legitimate governmental purpose. Insistence upon a proper application of the existing test will dramatically decrease any demands for a higher, strict scrutiny test.

3.

Under Title IX Sex Discrimination in Educational Facilities Must Be Strictly Scrutinized.

This case also presents a statutory claim of considerable importance: whether Title IX of the Education Amendments of 1972, and, in particular 20 U.S.C. §1681, forbid the maintenance of sex segregated athletic teams. The significance of Title IX and its relation to the instant action must not be overlooked. Congress has mandated that sex discrimination in education, including athletics, be eradicated. This clear expression of congressional intent allows for the imposition of gender based classifications only in the narrowest of circumstances.

Even though this Court has yet to deem sex a suspect classification requiring strict scrutiny, Congress has done so through Title IX. Note, *Sex Discrimination and Intercollegiate Athletics,* 61 Iowa L.Rev. 420, 483 (1975). With respect to federally funded educational programs and activities, no person may be subjected to discrimination on the basis of sex. 20 U.S.C. §1681. The language of this provision, similar to that of the proposed equal rights amendment, suggests that Congress deemed sex classifications in education as suspect.

To withstand scrutiny under Title IX, a policy of discrimination must serve a compelling state interest, and must be the least restrictive means of achieving this interest. As noted *infra,* there are various options available by which the objective of promoting women's athletics can be achieved without infringing on petitioner's rights. The existence of these less restrictive alternatives leads to the inescapable conclusion that strict sex segregation in school athletics violates Title IX.

The policy underlying Title IX is clear. Congress sought to make available to all persons, regardless of their sex, equal access to educational opportunities so that they could develop to their full potential. Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, supra* at

1264, citing *Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Cong. 1st Sess. 168-72 (1975) (statement of Sen. Bayh). Equal opportunity to develop cannot be achieved if exceptional women athletes are relegated to less competitive, single sex teams, where the level of competition to which they would be exposed would be far inferior to that available on boys' teams. While on its face the structure of single sex teams appears to encompass neutral standards, it results in precisely the type of discrimination against females which Title IX was intended to eliminate.

The Court of Appeals gave little attention to petitioner's statutory claim. It decided that since respondents appeared to have complied with the applicable regulations of the Department of Education, no Title IX violation was established. The Seventh Circuit wholly failed to interpret the meaning and intent of Title IX. Moreover, it never considered whether the federal regulation comported with either constitutional or statutory requirements or whether the regulation's internal inconsistencies rendered it useless.

If the regulation relied upon by respondents and the Court of Appeals exceeds constitutional limits, or if it goes beyond the bounds of the statute under which it has been promulgated, then it makes no difference whether respondents have complied with its terms. The regulation does not justify unconstitutional discrimination, nor does it provide justification for segregation which is statutorily prohibited. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) Because the prohibition of women from playing on men's athletic teams violates both the equal protection and due process clauses of the fifth and fourteenth amendments, as well as Title IX, such a discriminatory practice cannot be saved merely because it is sanctioned by the Department of Education.

The regulation upon which respondents and the Court of Appeals relied is self-contradictory. While 45 C.F.R. §86.41(b)

permits sex segregated athletic teams under certain circumstances, subsection (c) of the regulation requires that schools provide equal athletic opportunities. This latter standard requires a consideration of whether the "levels of competition effectively accommodate the interests and abilities of members of both sexes." 45 C.F.R. § 86.41(c).

These two provisions are clearly inconsistent. The former allows sex segregated teams, yet the latter forbids single sex teams to the extent that they do not accommodate the interests and abilities of all athletes. Though this latter standard appears to be constitutional, the other plainly exceeds constitutional limits. Either the regulation in its entirety must be disregarded because of its inconsistencies, or, at a minimum, the unconstitutional portions stricken. In either case, respondents may not rely on the regulation to justify their unconstitutional and statutorily improper conduct.

Title IX was enacted to eradicate sex discrimination in education. It was designed to eliminate the archaic and overbroad generalizations about sex roles which had at one time pervaded the educational system. *See* Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, *supra* at 1269. Speaking out of both sides of their mouth, respondents claim to promote women's athletics, yet they perpetuate the discriminatory practices of the past. Such hypocrisy must not be condoned.

CONCLUSION

The decision of the Court of Appeals on both the constitutional and statutory claims raised by petitioner relates to the very heart of her complaint. The issues before the Seventh Circuit and the questions raised in the instant petition for certiorari are "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Petitioner brings before this Court the central issues of law which will control the outcome of this matter and countless other similar lawsuits. The importance of these legal questions, coupled with the frequency with which they continue to arise, suggest the appropriateness of and necessity for Supreme Court review.

On the basis of the foregoing, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2501

KAREN O'CONNOR, by her parents and next friends, JOSEPH O'CONNOR and FRANCES O'CONNOR,

Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 23, a body politic and corporate, DEAN EITEL, SALLYANN OKUNO, JANE ADELMAN, SUSAN LEWIS, JAMES KASTNER, ANN MARIE LUNDSTROM, and MARY ANN STITAK, as officers and members of the BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 23, EDWARD GRODSKY, as Superintendent of School District No. 23, GERALD MCGOVERN, as Assistant Superintendent of School District No. 23, PHILIP ARENSTEIN, as Principal of MacArthur Junior High School, MID-SUBURBAN JUNIOR HIGH SCHOOL CONFERENCE, and ROBERT D. WHITE, an officer of the MID-SUBURBAN JUNIOR HIGH SCHOOL CONFERENCE,

Defendants-Appellants.

Appeal from an Order for Preliminary Injunction of the District Court for the Northern District of Illinois, Eastern Division. No. 80 C 5660—**Prentice H. Marshall**, *Judge.*

ARGUED DECEMBER 11, 1980—DECIDED APRIL 10, 1981

Before SPRECHER, BAUER, and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* In this equal protection case, the district court granted a preliminary injunction

restraining the Board of Education of Prospect Heights School District No. 23, and other defendants, from refusing to permit plaintiff-appellee Karen O'Connor to try out for the boys' sixth grade basketball team. We stayed enforcement of the preliminary injunction pending appeal and now reverse.

I

Karen O'Connor is an 11-year-old sixth grade student at MacArthur Junior High School in suburban Cook County, Illinois. The school is a member of the Mid-Suburban Junior High School Conference, an association of six junior high schools engaged in interscholastic athletics. Conference rules require separate teams for boys and girls in contact sports, including basketball.[1]

On August 27, 1980, Karen's father asked that she be permitted to try out for the boys' interscholastic basketball team. Karen is a good athlete; a professional basketball coach who observed her play rated her ability as equal to or better than a female high school sophomore and equal to that of a male eighth-grade player. Nonetheless, on October 10, 1980, the Board of Education denied the request, but invited Karen to try out for the girls' interscholastic team.

Karen, represented by her parents, filed her complaint and a motion for a temporary restraining order or preliminary injunction on October 22, 1980. The district court held an adversary hearing on October 23 and afterward rendered an oral opinion. The court held that the O'Connors had established a likelihood of success on the merits and that Karen would suffer irreparable injury if temporary relief was denied. The court found that the school's classification violated her fundamental "right to develop" and that "the right to education is a fundamental right and the rights to the constituent elements of an education is a fundamental right [sic]." The court further held that the MacArthur programs

[1] The Mid-Suburban Junior High School Conference is not a party to this appeal.

for boys' and girls' basketball were unequal because Karen's competition with girls of substantially lesser skill was not as valuable as competition with persons of equal or better skills in the boys' program. The district court also rejected defendants' argument that they would have to open both teams to both sexes and that the boys would dominate. Applying a strict scrutiny analysis, the court held simply that the Board had failed to show that the MacArthur program was the least restrictive alternative.

The district court refused to grant a stay pending appeal. Defendants immediately applied for a stay in the Court of Appeals, which was granted on October 27 by a three judge panel. On October 29, this Court, sitting *en banc*, voted 5 to 3 to continue the stay pending appeal.

Plaintiff filed a petition to vacate the stay with Mr. Justice Stevens, sitting as Circuit Justice. On November 4, 1980, he denied the petition, holding that the circumstances did not justify a departure from the usual rule of according great deference to a Court of Appeals decision to enter a stay. *O'Connor v. Board of Education*, 49 U.S.L.W. 3351 (Nov. 4, 1980) (Stevens, Circuit Justice).

Tryouts for the boys' basketball team at MacArthur took place on October 28, 1980 through October 30, 1980. Karen was not permitted to try out for the team and she voluntarily chose not to try out for the girls' team.

II

A

We can reverse the grant of a preliminary injunction only if "the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). The district court's exercise of discretion in issuing a preliminary injunction is guided by four familiar factors:

(1) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue;

(2) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant;

(3) whether the plaintiff has at least a reasonable likelihood of success on the merits; and

(4) whether the granting of a preliminary injunction will disserve the public interest.

Reinders Bros. v. Rain Bird Eastern Sales Corp., 627 F.2d 44, 48 (7th Cir. 1980). The likelihood of success factor serves as a threshold requirement. We have held that if this factor is unsatisfied, and if the plaintiff has not shown irreparable injury, the court need go no further in denying the preliminary injunction. *Kolz v. Board of Ed. of City of Chicago*, 576 F.2d 747 (7th Cir. 1978). We conclude that the district court abused its discretion in issuing this preliminary injunction.

B

To be constitutional, a gender-based discrimination must serve important governmental objectives. The discriminatory means employed must be substantially related to the achievement of those objectives. *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

Notwithstanding these well-settled standards of review, recently reaffirmed in *Michael M. v. Superior Court of Sonoma County*, 49 U.S.L.W. 4273, 4274 (S. Ct. March 23, 1981), Judge Marshall subjected the MacArthur program to strict scrutiny. He conceded that the "Supreme Court has been very reluctant to conclude that gender-based classifications are suspect." He nonetheless held that the right to personal development and the right to education were "fundamental rights" impinged by the MacArthur program, thus triggering strict scrutiny. He further found that the separation of boys' and girls' programs to prevent male domination of

the sports program and to maximize participation in sports was a compelling state interest because it protected the girls' right to develop. He concluded, however, that the MacArthur program was not the least "restrictive way by which those interests can be protected." The court therefore found that Karen demonstrated a likelihood of success on the merits.

Neither Judge Marshall nor plaintiff cite any authority to support the proposition that either education or the "right to develop" is a fundamental right. The Supreme Court has expressly rejected the notion that education is a fundamental right. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 29-39 (1972).

Were the law unsettled, we would have more difficulty finding an abuse of discretion here. Judge Marshall's decision, however, repudiates settled Supreme Court doctrine. Viewed under the correct standard, the main issue here is whether Karen O'Connor has demonstrated a reasonable likelihood that the two team approach is not substantially related to the objective of maximizing participation in sports, the avowed objective of the school board. We think she has failed. Unlike some interscholastic athletic programs,[2] the MacArthur program treats the two sexes identically—plaintiff concedes that the teams are equal in terms of funding, facilities, and other "objective" criteria. Both teams are interscholastic. "Separate but equal" teams have received

[2] The programs challenged in the sports cases cited by appellee totally excluded women. *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977); *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975), *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1975); *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D. R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); *Leffel v. Wisconsin Interscholastic Athletic Ass'n.*, 444 F. Supp. 1117 (E.D. Wisc. 1978). The school district in *Gomes* opted for a system of co-ed interscholastic teams, and an additional separate girls' team. Plaintiff argued that the *Gomes* system was the least restrictive alternative to promote the stated governmental objective. We express no opinion on the constitutionality of this alternative.

endorsement in many circuits, including this one. *See Bucha v. Illinoi, High School Ass'n.*, 351 F. Supp. 69 (N.D. Ill. 1972).

The only difference between the teams thus far adduced from the record is the level of competition. Since the boys' team is a better team, Judge Marshall concluded that the two teams were unequal because the girls' team would not foster development of Karen's skills. In *Leffel v. Wisconsin Interscholastic Athletic Ass'n.*, 444 F. Supp. 1117, 1121 (E.D. Wis. 1978), Judge Gordon quickly dismissed an identical claim, stating, "[t]here are no allegations in the instant complaint that the defendants intentionally imposed different levels of competition on boys and girls. Any such differences arise from the abilities of the team members themselves."

We agree. At this stage in the proceedings, the defendants have demonstrated that their program substantially serves the objective of increasing girls' participation in sports.

Judge Marshall found the maximization of participation in sports to be a compelling state interest. It is therefore certainly an important governmental objective. In Judge Marshall's opinion, the MacArthur system was not the least restrictive alternative. Even he, however, conceded that the sex-based classification substantially furthered the governmental objective, thus satisfying the equal protection clause.

Judge Marshall's decision cannot be upheld on the basis of the alleged arbitrariness of the MacArthur program. As Justice Stevens held, in denying the application for a stay,

> In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the class-

> ification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.

O'Connor v. Board of Education, 49 U.S.L.W. at 3352.

Karen has failed to show a reasonable likelihood of success on the merits of her equal protection claim. The same answer must obtain as to her remaining claims.

The total exclusion of boys from a girls-only sport does not violate the Illinois Constitution, which has been interpreted to regard sex as a suspect classification. ILL. CONST. art. I, § 18; *Petrie v. Illinois High School Ass'n*, 394 N.E.2d 855 (Ill. App. 1979); *People v. Ellis*, 311 N.E.2d 98 (Ill. 1974). It is highly unlikely, therefore, that Karen could demonstrate that the provision of separate teams for boys and girls violates the Illinois Constitution.

Nor can plaintiff establish a violation of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681. Title IX aims to provide equal opportunity in educational programs without discrimination on the basis of sex. The MacArthur program appears to be in complete compliance with Title IX and the regulations promulgated thereunder. 45 C.F.R. § 86.41(b). Plaintiff's major challenge under this statute is the validity of the regulations, which expressly permit separate-sex teams and permit exclusion of girls from contact sports, including basketball. Plaintiff, however, presented no evidence at the hearing to support her claim that the regulations violate Title IX. Justice Stevens, in fact, stated that defendants' compliance with the regulations "indicate[s] a strong probability that the gender-based classification can be adequately justified." *O'Connor v. Board of Education*, 49 U.S.L.W. at 3352. Here, too, plaintiff has failed to demonstrate a reasonable likelihood of success on the merits.[3]

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[3] Section 27-1 of the Illinois School Code, ILL. REV. STAT. ch. 122, § 27-1 (1979 Supp.), and its implementing guidelines permit separate teams for contact sports. The analysis under Title IX is fully applicable to the Illinois statute.

Plaintiff's final claim is that she has been denied due process. She claims that Illinois has conferred a property right in educational development in Article X, Section 1 of the Illinois Constitution. Article X, Section 1, states in part:

> . . . a fundamental goal of the people of the State of Illinois is the educational development of all persons to the limit of their capacity.

Article X, Section 1, of the Illinois Constitution "is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form." *Pierce v. Board of Ed. of City of Chicago*, 370 N.E.2d 535, 536 (1977). It therefore cannot form the basis of a protectable property interest.

Nor has the MacArthur program infringed any liberty interest of plaintiff. Only one court has found a liberty interest involved in similar circumstances. *Yellow Springs Exempted School District v. Ohio High School Athletic Association*, 443 F. Supp. 753 (S.D. Ohio 1978), *appeal pending*, Nos. 78-3131 and 3132 (6th Cir.). We decline to follow that decision. It is based on the irrebuttable presumption doctrine, which has been found to be co-extensive with the equal protection clause. *International Union, UAW v. Indiana Employment Security Board*, 600 F.2d 118 (7th Cir.), *cert. denied*, 444 U.S. 951 (1979); *Trafelet v. Thompson*, 594 F.2d 623, 630 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979). Having concluded that the MacArthur program does not violate equal protection, we cannot find it unconstitutional as creating an irrebuttable presumption. In sum, we believe Karen has failed to demonstrate a reasonable likelihood of success on the merits of her claims.

Nor has plaintiff made such a strong showing of irreparable injury that we might overlook the serious deficiencies of her case on the merits. The purpose of a preliminary injunction is to preserve the status quo. *EEOC v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980). We agree with Justice Stevens that "*if* Karen will probably succeed on the merits, she would suffer greater harm than would the defendants by allowing her to try out for the boys' team." *O'Connor v. Board of*

Education, 49 U.S.L.W. at 3352 (emphasis added). We have found, however, that Karen has not demonstrated a reasonable likelihood that the program is unjustified. Karen was given the opportunity to play on the girls' team. The equality of the teams diminishes Karen's claim to injury, and her voluntary refusal to try out for that team was not the result of the defendants' actions.

We do not denigrate the potential harm to Karen from the defendants' refusal to let her try out for the boys' team. But we do not believe it justifies turning aside years of settled Supreme Court law after a hasty hearing on a preliminary injunction. While the full trial will allow a broader examination of her claims, she was not entitled to preliminary injunctive relief. The preliminary injunction is therefore dissolved. We remand for further proceedings consistent with our judgment.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

July 2, 1981

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiff-Appellee Karen O'Connor, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc.** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Luther M. Swygert, the Honorable Thomas E. Fairchild and the Honorable Richard D. Cudahy voted to grant the petition for rehearing *en banc.*

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-384

Karen O'Connor, by her parents and next friends, Joseph O'Connor and Frances O'Connor, Applicant, *v.* Board of Education of School District 23 et al.	On Application to Vacate Stay.

[November 4, 1980]

MR. JUSTICE STEVENS, Circuit Justice.

On October 27, 1980, a panel of the United States Court of Appeals for the Seventh Circuit granted a stay pending appeal of a preliminary injunction entered by the District Court in favor of the plaintiff. Two days later, the Court of Appeals sitting en banc entered an order continuing the stay. The plaintiff has submitted to me, in my capacity as Circuit Justice, an application to vacate this stay. For the reasons explained below, I have decided not to vacate the stay entered by the Court of Appeals.

I

On October 22, 1980, plaintiff Karen O'Connor, represented by her father and her mother, filed a verified complaint and a motion for a temporary restraining order and preliminary injunction, supported by appropriate affidavits, in the United States District Court for the Northern District of Illinois. Her papers allege the following facts which, since they have not yet been denied or contradicted by countervailing affidavits or evidence, must be accepted as true.

Karen is an 11-year-old sixth grade student at MacArthur Junior High School; she is 4'11" tall and weighs 103 pounds. For at least four years she has successfully competed with

boys in various organized basketball programs. A professional basketball coach who witnessed her play with boys and girls aged 10 to 13 during the summer of 1980 rates her ability as equal to or better than a female high school sophomore player and equal to that of a male eighth-grade player.

MacArthur Junior High School is a member of the Mid-Suburban Junior High School Conference, an association of six junior high schools engaged in interscholastic athletics. MacArthur has programs for seventh and for eighth-grade teams; sixth-grade students are eligible to tryout for both the seventh and the eighth-grade teams. Students of either sex may compete on the same teams in some noncontact sports, but Conference rules require separate teams for boys and girls for contact sports. Contact sports include "boxing, wrestling, rugby, ice hocky, football, basketball and other sports the purpose of major activity of which involves bodily contact." See Complaint ¶ 35.

On August 27, 1980, Karen's father requested that she be permitted to tryout for the boys' basketball teams. After a series of requests and refusals, Karen and her parents commenced this litigation, seeking both a temporary order requiring defendants to allow her to participate in the tryouts which were originally scheduled to commence on October 27, 1980, and permanent relief allowing her to play in interscholastic competition if she made either the seventh or the eighth-grade team.

After an adversary hearing, on October 23, 1980, the District Court rendered an oral opinion and granted temporary relief to the plaintiff. The court held that the plaintiff had established a likelihood of success on the merits and that she would suffer irreparable injury if temporary relief was denied. The court concluded that she had a constitutionally protected interest in equal access to training and competition that would develop her athletic talents. The court rejected the two justifications presented by the defendants at the hearing.

First, without deciding whether the provision of separate but equal facilities to male and female students would avoid

any constitutional objection, the District Court found that the separate programs offered by the defendants were not in fact equal because Karen's opportunity to compete with persons of substantially lesser skill in the girls' program was not as valuable as the opportunity to compete with those who are equal or superior to her in ability in the boys' program.

Second, the defendants argued that if they allowed Karen to tryout for the boys' teams, they would have to allow boys to tryout for the girls' teams, and since boys generally have superior athletic ability, the boys would dominate the girls' programs and ultimately deprive girls of a fair opportunity to engage in competitive athletics. The District Court rejected this argument, stating merely that the defendants had not persuaded him that there were no less restrictive alternatives available, other than completely separate programs classified entirely on the basis of sex.

The District Court refused to grant a stay pending appeal. As I understand the facts, defendants thereafter (1) postponed the tryouts;[1] (2) filed an appeal from the preliminary injunction requiring them to allow Karen to tryout for the boys' teams; and (3) applied to the Court of Appeals for a stay of the District Court's injunction. On October 27, by a vote of 2 to 1, a three-judge panel granted a stay, without opinion. On October 29, 1980, the Court of Appeals, sitting en banc, voted 5 to 3 to continue the stay pending the appeal. On October 31, 1980, the plaintiff filed her petition to vacate the stay entered by the Court of Appeals, supported by various papers filed in the District Court and the Court of Appeals. Defendants filed their response on November 3, 1980.

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[1] The papers filed on behalf of Karen in this Court suggest that the defendants rescheduled the tryouts in order to deprive Karen of the opportunity to tryout for the boys' teams while the defendants sought a stay from the Court of Appeals. The defendants assert that the rescheduling was required because of the postponement, due to inclement weather, of another athletic event. Because the motive underlying the rescheduling is not relevant to the question presented here, resolution of this factual conflict is unnecessary.

II

Although I have the power, acting as Circuit Justice, to dissolve the stay entered by the Court of Appeals. *Holtzman v. Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers), this power is to be exercised "with the greatest of caution and should be reserved for exceptional circumstances." *Id.*, at 1308. A Court of Appeals' decision to enter a stay is entitled to great deference. *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 434 U. S. 1316, 1319 (1977) (MARSHALL, J., in chambers); such deference is especially appropriate when the Court of Appeals has acted en banc. Nevertheless, the question presented by the petition is sufficiently difficult to justify careful consideration.[2] In answering that question, I shall first identify certain propositions that seem to be adequately established.

First, there is no dispute about the fact that the defendants have acted under color of state law and that their refusal to allow Karen to tryout for the boys' teams is based solely on the fact that she is a girl. Whether or not Karen's interest in improving her athletic skills is characterized as "fundamental" or something less, I think it is clear that the defendants have the burden of justifying a discrimination of this kind.

Second, since the burden of justification was on the defendants, at this stage of the proceeding the stay entered by the Court of Appeals cannot be upheld on grounds not yet supported by the record, even though it may remain open to the defendants to offer additional evidence at a full trial. Thus, for example, the defendants have preserved the right to offer evidence to support the proposition that the exclusion of girls

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[2] The difficulty of the question presented by the defendants' request for a stay is illustrated by the fact that Judge Cudahy, a member of the majority of the panel which granted the stay on October 27, dissented from the Court of Appeals' en banc decision to continue the stay on October 29.

from the boys' teams is necessary to protect female athletes from harm. They were unable to present evidence supporting such a justification at the preliminary hearing, however, and therefore this justification is not available to them at this stage of this proceeding. Defendants have also made no claim that the *boys'* athletic program would be harmed in any way by allowing Karen to participate.[3] Nor have they suggested that the exclusion of Karen is necessary in order to protect Karen from harm.

Third, although the record is incomplete, plaintiff does not appear to dispute defendants' representation that the separate athletic programs for the girls are equal to the boys' programs in the sense that the time, money, personnel and facilities devoted to each are equal. Defendants are therefore correct in putting to one side the cases in which a number of courts have ordered schools to allow girls to participate on boys' teams following a showing that the girls' programs were inferior.

Fourth, in deciding whether to vacate the stay, I have a duty to consider the potential of irreparable harm to the respective parties. Although defendants have argued to the contrary, I am persuaded that the District Court was correct in concluding that if Karen will probably succeed on the merits, she would suffer greater harm than would the defendants by allowing her to tryout for the boys' teams. I am therefore persuaded that the stay can only be supported by the sufficiency of the defendants' showing that there is an

[3] In their response filed in this Court, the defendants have suggested that the girls' basketball program will be injured if Karen is allowed to participate in the boys' program, because the girls' program will then be deprived of its best athlete. This justification, like the need to protect female athletes from physical or psychological harm, while plausible, is not supported by the present record. It cannot, therefore, be used as a basis for upholding the stay entered by the Court of Appeals. The fact that defendants advance this argument indicates that they regard Karen as still eligible to participate in the girls' program even though she declined to participate in the girls' tryouts while this matter has been pending.

adequate reason for discriminating against Karen because of her sex.

In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.[4]

It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events. The defendants' program appears to have been adopted in full compliance with the regulations promulgated by the Department of Health, Education, and Welfare.[5] Although such com-

[4] I share District Judge Marshall's view that if attention is confined to the application of the rule to Karen—rather than to the general validity of the rule—the discrimination does appear arbitrary. In some respects, Karen's claim is no different from that of any other sixth or seventh grader. The younger children are permitted to tryout for the eighth-grade teams, but the eighth graders are excluded from the seventh-grade teams because their participation would be unfair to the younger students. The fact that an eighth grader must face competition from talented seventh graders without reciprocal rights indicates that there is no necessary reason why boys may not be required to compete with talented girls without reciprocal rights. I would also note that Karen's claim is supported by the Court's equal protection analysis in *Craig* v. *Mohammed*, 441 U. S. 380, 391–394 (1979); *see id.*, at 403–412 (STEVENS, J., dissenting).

[5] The Department of Health, Education, and Welfare, pursuant to Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681, promulgated regulations designed to eliminate discrimination on the basis of sex

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pliance certainly does not confer immunity on the defendants, it does indicate a strong probability that the gender-based classification can be adequately justified. At least that probability is sufficient to persuade me that I should adhere to the practice of according deference to the judgment of the majority of my colleagues on the Court of Appeals.

The petition to vacate the stay is denied.

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in education programs and activities receiving federal financial assistance. One of these regulations, specifically addressing gender-based discrimination in athletic programs, provides in part:

"[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact." 45 CFR § 86.41 (b).

APPENDIX D

EXCERPTED TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE PRENTICE H. MARSHALL, in the United States District Court for the Northern District of Illinois, case no. 80 C 5660, on Thursday, October 23, 1980.

THE COURT: The rather severe time constraints that we are all operating under render it almost impossible for me to write anything for you, and I am fearful that it may make almost impossible any clear-cut or articulated thread that will run through the remarks that I am going to make now.

But what I say at this time will stand as my findings of fact and conclusions of law with respect to the motion for the preliminary injunction, and also will stand as the reasons for my decision under Rule 52(a) and 65(d) of the Federal Rules of Civil Procedure.

The facts in the case are, as I see them, relatively undisputed, and I think that the beginning point in any analysis of the problem is that the case law has evolved consistently along the lines that under the equal protection clause state educational institutions and agencies thereof, such as are involved in this case, may not deny a female the opportunity to participate in so-called contact sports, and particularly the sport which is before me today, basketball, merely because of their gender.

Females cannot be entirely excluded from this type of activity just because they are females.

And the cases are consistent as they have been cited in the briefs of both parties that where there is only one team, girls or women must be permitted to try out for that one team in competition with the boys or the men.

In recognition of that, as well as the—as Title 9 and the regulations adopted pursuant thereto, and also certain state law, which is implicated in this case, schools have been encouraged by both state and federal officials to create a dual track for interscholastic athletic competition, and that's what's involved in this case.

The defendants take the position that the dual track satisfies the equal protection argument advanced by the plaintiffs which I believe to be their strongest argument, although I must say that I found—I found quite understanding Judge Reuben's opinion in the Yellow Spring School District case, and he, of course, predicates his decision upon a due process concept.

The defendants in essence assert that they have lawfully or constitutionally provided a separate but equal program for Karen O'Connor and others of her gender, and that it is constitutionally permissible that her interscholastic competition be limited to that alleged separate but equal program.

I find great difficulty with accepting the equality phase of that formula.

Indeed, I have that difficulty in light of the facts which we discussed just prior to the recess, and which in essence I said I would judicially notice, and that is that in any given group today, of women and men, or boys and girls of the same general age and level of experience, that the men in activities of the type involved here will dominate or will excel, or will perform at a higher level.

Inherent in that, it appears to me, are the facts which dispel the equality of the separate but equal approach.

What we are principally concerned with here, at this level of—or at this age level particularly—we are not trying to forecast whether Karen O'Connor is going to be able to play in the N.B.A. Without intending in any way to be facetious, we can all agree that she's going to have to grow a little taller before she could go in the N.B.A. And she may not turn out to be a female of tall stature.

What we are looking at now with this young person is skill development. She has particular physical attributes, and she wants to develop them to their highest level, at least this is her ambition at this point in her life.

From what I know, and I think it is appropriate in the context of an application for preliminary relief for me to take into account my experiences in life, not as a witness but just as life has passed me by or as I have observed it, when you are dealing with physical skill development of this type, the level of competition in which you are permitted to participate has a direct bearing upon your development.

If you are permitted to compete or participate only with those of lower skills than yours, you are not challenged to the next level of performance.

And that's the situation in which Karen O'Connor now finds herself.

She has, from all that has been presented here, surpassed her peer group, her gender and age peer group. And while she will be self-motivated perhaps to attain yet a higher level of the perfection or development of her skills, she is being deprived because of her gender of the opportunity to compete with those who are at or superior to her so that she can in turn improve her own skills commensurate with theirs, or as stimulated by theirs.

And, so as it is my opinion, as I hear the case on a motion for a preliminary injunction, that Karen O'Connor has shown a strong likelihood of success with respect to the equality in the separate but equal formula which is just all a long-winded way of saying that these are not equal programs.

And the mere facts that they are coached comparably, have comparable physical plants, comparable schedules, et cetera, does not render them equal.

Now, that, of course, is just a beginning point.

If we conclude that they were in fact equal, that might be the end of the discussion, although I have some doubts about that.

But concluding that they are not equal, we now have to turn to the question of well, is it nonetheless appropriate for these state instrumentalities to so classify her based on her gender?

I suppose I am obliged under the present state of authorities to get into this thicket of fundamental right versus nonfundamental right or interest and suspect classifications versus non-suspect classifications.

It's pretty clear that the United States Supreme Court has been very reluctant to conclude that gender-based classifications are suspect.

My contemporary, Judge Match, in his opinion in Hooever against Meiklejohn traces the history of it all fairly well. I don't know that I agree with him when he hypothesizes why the Court has been reluctant to characterize sex classification or gender classification as suspect in his hypothetical about public toilets.

But he traces it, and I am content today to live with the proposition that gender-based classifications are not inherently suspect.

That's just a part of it, though, because the next inquiry is whether some fundamental right is implicated in what this young woman or young girl wants to do.

It's pretty simple to say, well, you don't have a fundamental right to play basketball. But I do believe that you do have a fundamental right to develop emotionally and to develop your intellectual talents and to develop your physical talents and skills, and I think the three intermesh, and they all involve person development.

I think that we do have a fundamental right to develop our persons and our being.

Indeed, I don't know of a more fundamental right than the right to develop one's being.

And I think that's what's involved here. I believe that indeed our educators recognize this when they devote the substantial resources and energies to intramural and inter-scholastic athletic programs.

This must be in recognition of the fact that there is a place for those activities in the life of the developing child.

And, from what little I have read in this case, I get the impression that today—and it's been awhile since I have been involved in rearing children of this age—that today perhaps more resources on a comparative basis are devoted to these activities in the grade and junior highs than in the high schools and in the colleges and a greater percentage of people engage in them, in the younger ages.

I have observed that over the years, that a far greater percentage of youngsters engage in some form of competitive athletics in the grade school ages, and then as they grow older they drop by the wayside.

I think for the purposes of this preliminary injunction hearing, that I am not afield when I say that the right to develop is a fundamental right, the right to education is a fundamental right, and the right to the constituent elements of an education are fundamental rights, and that in our society today, the activities that are here—that we are here concerned with are constituent elements of Karen O'Connor's education, and, therefore, she is being deprived or is being classified in respect to a fundamental right.

This being so, we are told by the Supreme Court that we are to strictly scrutinize the classification and determine whether it is justified by a compelling state interest, and that necessarily implicates whether there is a less restrictive device available.

I have reached the conclusion that there is a reasonable likelihood that Karen O'Connor will succeed on the merits on that issue.

I suppose inherent in what I have said thus far is that there is a reasonable likelihood that she will succeed on the other issues as well.

But this issue, I think, is the most difficult in the case. In light of the facts which we judicially noticed, and to which I have referred, I recognize that there is a risk of boys flooding into girls programs and dominating them, and I have just given substantial constitutional stature to the activities that this plaintiff wishes to engage in, and the protection of those activities for others is certainly a substantial or legitimate state interest, and my own view is that the protection of those fundamental rights for others is a compelling state interest.

The real question is: Is this the only way or the least restrictive way by which those interests can be protected for others?

And, as I sit here today, I am not persuaded that it is.

Accordingly, I have reached the conclusion that Ms. O'Connor, by her parents, has demonstrated a reasonable likelihood that she will succeed on the merits of her equal protection claim.

I have already spoken during colloquy with counsel of the fact that in balancing the interests, I believe that she prevails on that, and that she does not have an adequate remedy at law, and that it is not contrary to the public interest to grant her preliminary injunctive relief.

Accordingly, the motion for a preliminary injunction is granted, and I would think that it would be a simple matter, Ms. Guadnolo, if you have not already prepared one, to prepare an appropriate preliminary injunctive order directing the defendants to permit her to participate when the matter comes to a head on Monday.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. § 1681 (a)

Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . .

45 C.F.R. § 86.41(a)(b) & (c)

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Opposition

Supreme Court, U.S.
FILED
NOV 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAREN O'CONNOR, by her parents and next friends, JOSEPH O'CONNOR and FRANCES O'CONNOR,
Petitioner,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT 23, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Is it permissible for the Respondents to structure their interscholastic athletic program by using sex as one criterion for eligibility?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAREN O'CONNOR, by her parents and next friends, JOSEPH O'CONNOR and FRANCES O'CONNOR,

Petitioner,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT 23, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The Respondent, Board of Education of Prospect Heights School District No. 23, Cook County, Illinois, is a body politic and corporate. The seven members of the Board serve for three-year terms without pay. One of the District's schools is MacArthur Junior High School, which provides education for students in sixth grade through eighth grade. The Petitioner, Karen O'Connor, is currently enrolled in the seventh grade at the school. MacArthur Junior High School is a member of the Mid-Suburban Junior High School Conference, an association of six junior high schools engaged in interscholastic athletics.

Under the directions, guidance and mandates of the Mid-Suburban Junior High School Conference rules, the regulations promulgated under Title IX, and the Illinois Implementing Guidelines, the Respondent Board of Education has instituted in its schools a program of interscholastic athletics that offers equal opportunity for participation by male and female students. There is no question concerning the Board of Education's compliance with the regulations promulgated under Title XI of the Education Amendments Act of 1972 and similar Illinois statutes with respect to interscholastic basketball. (20 U. S. C. § 1681 (1978); 45 C. F. R. § 86.41(b); *Ill. Rev. Stat.*, 1979, ch. 122, § 27-1).

The Petitioners make no allegations that the teams are unequal with respect to funding, facilities, equipment, uniforms, schedules, practice time, length of the season and coaching. The Petitioners do allege that the level of competition is lower on the girls' team than on the comparable boys' team. However, Petitioners do not allege that the difference in levels of competition is in any way caused by the conduct of the Respondents. The District Court also took judicial notice that boys at this level were, on the whole, so superior to the girls that if both teams were open to competition from both sexes, the boys would dominate the teams (Appendix D to Petition for Writ of Certiorari p. 2d).

The Petitioner requested that she be permitted to try-out and play on the boys' interscholastic basketball team. On Friday, October 10, 1980, the Board denied the request, but extended an invitation to the Petitioner to try-out for the girls' interscholastic team. The Petitioner was not permitted to try-out for the boys' team and voluntarily chose not to try-out for the girls' team.

The rules of Respondent Mid-Suburban Junior High School Conference, a conference of public schools and one parochial school, also require separate basketball teams for boys and girls.

SUMMARY OF ARGUMENT

The Respondents request that an order be entered denying the Petition for Writ of Certiorari.

In this equal protection case, the District Court, after a hasty hearing, granted a preliminary injunction requiring the Respondents to permit the Petitioner, Karen O'Connor, to try-out for the boys' basketball team. The injunction was granted after a brief, non-evidentiary hearing, upon less than one day's notice to the Respondents. Due to the short notice, the Respondents were not able to present all of their possible defenses. These issues may be raised at a later trial on the merits and could eventually result in another Petition for Writ of Certiorari.

In addition, the District Court, in granting the preliminary injunction, held that the right to education and its constituent elements are fundamental rights. This holding is contrary to long standing judicial precedent. *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1972). Therefore, the District Court was clearly erroneous in applying the strict scrutiny equal protection test to Respondents' gender-based classification.

Furthermore, separate basketball teams for each sex does not violate the Equal Protection Clause because the structure of the athletic program is substantially related to an important governmental objective (i.e. the maximization of participation of both sexes in the program).

ARGUMENT

1. The Petition for Writ of Certiorari Is Not Ripe for Review Since It Is Devoid of a Developed Factual Record.

The Petition for Writ of Certiorari is before this Court without a developed factual record on all material issues necessary for full disposition of this case. It must be emphasized that the case is before this Court only on the question of whether or not a preliminary injunction should issue. A trial on the merits has not been held. Rather, the District Court held a 45 minute hearing on a preliminary injunction. This adversary hearing was held with less than one day's notice to the Defendants and was not a full evidentiary hearing.

In response to Petitioner's claims, the Respondents have raised the defenses that separate teams for boys and girls are necessary to prevent male discrimination and to maximize participation of both sexes in the athletic program. However, because of the short notice, the Respondents were not able to present all of its substantive defenses to the Petitioner's claims at the hearing on the preliminary injunction. As Justice Stevens noted,

> "Thus, for example, the defendants have preserved the right to offer evidence to support the proposition that the exclusion of girls from the boys' teams is necessary to protect female athletes from harm. They were unable to present evidence supporting such justification at the preliminary hearing, however, and therefore, this justification is not available to them at this stage of the proceeding." *O'Connor v. Board of Education*, ____ U.S. ____, 101 S. Ct. 72, 74 (1980) (Stevens, Circuit Justice).

Even Petitioner admits that certain issues, though preserved for possible examination at a trial on the merits, are not presently before this Court (Petition for Writ of Certiorari p. 4).

These substantive defenses are not before this Court although they were properly preserved and are presently

pending before the District Court. These defenses may be raised at a trial on the merits and could produce a record that eventually would result in another Petition for Writ of Certiorari.

It would be untimely to grant the Writ at this stage of the proceedings, before an evidentiary record on all issues has been developed.[1] Furthermore, the precedential value of this Court's decision on the preliminary injunction would be minimal. Without a fully developed factual record upon which this Court can base its decision, the decision would foster abundant speculation as to its meaning and create more litigation.

2. The Petition for Writ of Certiorari Should Be Denied Since the Court of Appeals for the Seventh Circuit's Opinion Is Consistent With Long Standing Precedent.

The District Court held that the Petitioner had established a likelihood of success on the merits. The District Court also found that Respondent's classification of separate interscholastic basketball teams for boys and girls violated the Petitioner's fundamental "rights to develop" and that, "the right to education is a fundamental right, and the right to the constituent elements of an education are fundamental rights." (Appendix D to Petition for Writ of Certiorari p. 5d). The District Court applied the strict scrutiny equal protection test to the classification and held that the Respondent's program was not the least restrictive alternative.

The District Court's opinion, granting the preliminary injunction, was clearly erroneous and contrary to long standing judicial precedent. The right to education or its constituent

[1] The Respondent Board of Education notes that with respect to one of the defenses advanced by the Board at the preliminary injunction (i.e. maximization of participation for both boys and girls in interscholastic athletics), Petitioner, Karen O'Connor, has admitted throughout these proceedings that at the junior high school level boys would dominate the program if there were "sex-blind teams."

elements does not constitute a fundamental interest, the right to education being neither expressly nor implicitly recognized by the United States Constitution. *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 29-39 (1972). No federal court has ever held these interests to be fundamental rights. The Court of Appeals for the Seventh Circuit took note of these errors by the District Court when it said:

> "Neither Judge M hall nor plaintiff cite any authority to support the propo n that either education or the "right to develop" is a fur nental right. *San Antonio Independent School District* v. *Rodriguez* 411 U.S. 1, 29-39, 93 S. Ct. 1278, 1294-1300, 36 L.E.2d 16 (1972)." *O'Connor v. Board of Education,* 645 F.2d 578, 581 (7th Cir. 1981).

The law in this area is not unsettled as the Petitioner suggests. As the Seventh Circuit stated:

> "Were the law unsettled, we would have more difficulty finding an abuse of discretion here. Judge Marshall's decision, however, repudiates settled Supreme Court doctrine." 645 F.2d at 581.

It should be noted that Petitioner has apparently abandoned these arguments for purposes of her Petition for Writ of Certiorari. The Petitioner now concedes that this Court has consistently applied a "middle tier" test to gender-based classifications and not the strict scrutiny test applied to racial classifications.

To be constitutional, a gender-based classification must serve important governmental objectives and the means employed must be substantially related to the achievement of the objectives. *Wengler* v. *Druggists Mutual Insurance Company,* ____ U. S. ____, 100 S. Ct. 1540, 1545 (1980). The Respondent Board of Education's interscholastic basketball program serves an important governmental objective and is substantially related to the achievement of this objective.

Separate teams for boys and girls serves the important governmental objective of maximizing participation by *both sexes* in the basketball program. The courts have found that maximizing participation of diverse groups in various other state or state-sanctioned programs is an important governmental objective. *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975) (naval careers for women); *Palmer* v. *Ticcione,* 576 F. 2d 459, 462 (2d Cir. 1978) (teaching careers for younger teachers and minorities); *United Steelworkers* v. *Weber,* 443 U. S. 193 (1979) (apprenticeship training program for minorities). Thus, the maximization of participation of both sexes in the basketball program of the school district is an important governmental objective. *Petrie* v. *Illinois High School Association,* 75 Ill. App. 3d 980, 394 N. E. 2d 855, 862-863 (1979) (female participation in sports).

The Board of Education basketball program is also substantially related to its governmental objective of maximizing participation by *both sexes* in the basketball program. Because there is a marked and demonstrable difference in athletic ability between boys and girls at the junior high school level,[2] separate teams provide assurance that an equal number of girls and boys will have an opportunity to participate in and derive benefits from the interscholastic program. As Justice Stevens stated:

> "Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' program and deny them an

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[2] The District Court specifically found that, at any given age level, men would dominate in sports like basketball (Appendix D to Petition for Writ of Certiorari p. 2d), a fact conceded by the Petitioner. (*See also,* Affidavit of Bruno; *Cape* v. *Tennessee Secondary School Athletic Association.* 563 F. 2d 793, 795 (6th Cir. 1977); *Petrie* v. *Illinois High School Association;* 75 Ill. App. 3d 980, 394 N.E.2d 855, 861 (1979) (volleyball); *Gomes* v. *Rhode Island Interscholastic League,* 469 F. Supp. 659, 662 (D. R. I. 1979), *dismissed for mootness,* 604 F. 2d 733 (1st Cir. 1979) (volleyball))

> equal opportunity to compete in interscholastic events." *O'Connor v. Board of Education*, ____ U.S. ____, 101 S. Ct. 72, 75 (1980) (Stevens, Circuit Justice).

In essence, the separate team approach strikes an equitable balance between the differing needs and desires of *all* the students in the junior high school program. If the Board of Education provided an "open" or "sex blind" interscholastic basketball program, most, if not all, female students would be effectively precluded from participation in the basketball program. The separate team approach meets the needs of the female students by guaranteeing them a real opportunity to participate in interscholastic sports. At the same time, it does not overly restrict the rights of the male students who still have the opportunity to try out for an equal number of positions on the boys' team (although the total number of positions awarded to males is reduced over the open competition approach). Even the gifted girl athlete still has the right to compete in the strong and vital girls' program which must be equal to the boys' program. (See 45 C.F.R. 86.41(c)). (It should be noted that, although the overall level of competition on the girls' team may be lower than that of the boys' team, the gifted girl athlete would be competing against gifted girl athletes from other shools).

In this sense, the separate team approach utilized here and approved by HEW under Title IX is quite similar to the equal opportunity employment training program which the Supreme Court found to be permissible under Title VII of the Civil Rights Act of 1964 in *United Steelworkers* v. *Weber*, 443 U. S. 193 (1979). In reviewing the 50% white and 50% black training program requirements, the Court concluded:

> "The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.' 110 Cong. Rec. 6548 (Remarks of Sen. Humphrey).

> "At the same time the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. *Cf., McDonald v. Santa Fe Trail Transportation Co., supra.* Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white." 99 S. Ct. at 2730.

Moreover, every court that has had an opportunity to examine the equal protection problem of differing athletic ability levels of boys and girls has recommended a gender-based classification of separate athletic teams for male and female students as a permissible solution to this problem. *Yellow Springs Exempted Village School District* v. *Ohio High School Athletic Association,* 647 F. 2d 651 (6th Cir. 1981); *Hoover* v. *Meiklejohn,* 450 F. Supp. 164, 172 (D. Colo. 1977); *Leffel* v. *Wisconsin Interscholastic Athletic Association,* 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); *Ritacco* v. *Norwin School District,* 361 F. Supp. 930, 932 (W.D. Pa. 1973); *Bucha* v. *Illinois High School Association,* 351 F. Supp. 69, 75 (N.D. Ill. 1972); *Gomes* v. *Rhode Island Interscholastic League,* 469 F. Supp. 659, 663, 666 (D. R. I. 1979), *dismissed for mootness,* 604 F. 2d 733 (1st Cir. 1979).

Accordingly, the gender-based classification is substantially related to the achievement of the objectives in the same manner as the gender-based classifications approved by the United States Supreme Court in *Califano* v. *Webster,* 430 U. S. 351 (1977); *O'Connor* v. *Board of Education,* ____ U. S. ____, 101 S. Ct. 72, 75 (1980) (Stevens, Circuit Justice).

It must be emphasized that the Petitioner is not challenging the use of sex as a criterion in structuring the Board's basketball program. The Petitioner has never urged that the Board of Education adopt an athletic program based solely upon "open or sex blind" teams. Rather, the Plaintiff is attempting to substitute her gender-based program in place of

the one adopted by the Defendant Board of Education. This is a policy issue, not a constitutional issue and accordingly, it is an issue which this Court should not decide. *Gomes* v. *Rhode Island Interscholastic League*, 469 F. 2d 659, 666 (D. R. I. 1979), *dismissed for mootness*, 604 F. 2d 733 (1st Cir. 1979); *Hoover* v. *Meiklejohn*, 430 F. Supp. 164, 171 (D. Colo. 1977). *See, generally, Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970).

Finally, the Board's program has been adopted in full compliance with the regulations promulgated under Title IX. *O'Connor* v. *Board of Education*, ____ U. S. ____, 101 S. Ct. 72, 75 (1980) (Stevens, Circuit Justice). These regulations were adopted after extensive public comment and hearings. Once adopted by HEW, they received presidential approval and were reviewed without veto by Congress. The regulations have withstood judicial scrutiny for over five years and form the basis of scholastic athletic programs across the country. Therefore, such compliance indicates "a strong probability that the gender-based classification can be adequately justified." *O'Connor* v. *Board of Education*, ____ U. S. ____, 101 S. Ct. 72, 76 (1980) (Stevens, Circuit Justice).[3]

[3] Defendant notes that the Petitioner's argument that Congress has made sex a suspect classification requiring strict scrutiny through the passage of Title IX has been raised in the Petition for Writ of Certiorari for the first time. This argument was not presented to the District Court or Court of Appeals. Accordingly, this argument should not form the basis for this Court's granting the Petition for Writ of Certiorari.

CONCLUSION

The Respondents request that an order be entered denying the Petition for Writ of Certiorari.

Respectfully submitted,

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